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IN THE

Supreme Court of the United States

October Term, 1969

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No. 25

FREDERICK T. ZUBER, *et al.*,
Petitioners,

v.

RUSSELL ALLEN, *et al.*,
Respondents.

No. 52

CLIFFORD M. HARDIN, Secretary of Agriculture,
Petitioner,

v.

RUSSELL ALLEN, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO JOINT BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERALS OF MASSACHUSETTS, RHODE ISLAND AND CONNECTICUT

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SUMMARY OF ARGUMENT

The Act provides only for the payment of a *minimum* price, as this Court and many lower courts have noted on many occasions, and there is nothing in the Act or order that precludes the handler from paying an identical differential to the nearby producers if their milk actually does have any extra value. *Consequently, petitioners would suffer no financial injury if their claims are sound.* Any contrary contention or insistence that smaller dairy farmers pay the differential is an admission of the lack

of merit in their claim of extra value for their milk, and the grounding of such differential on historical use prices is also an admission that no current justification exists for the nearby differential payments.

The growth or spread of the nearby differential clearly indicates that the Secretary is unable to resist the political pressures of those few who seek an illegal preference, and this Court must act to prevent the regulatory program from becoming a national grab-bag based on political expediency. The administrative record for the 1964 Order discloses that the varying prices to producers resulting from the nearby differential actually predominated over all other factors in determining the movement of milk to market, a practice that occasioned uneconomical distribution and higher prices for consumers. These disorderly marketing conditions actually necessitated the merger of the Orders but the nearby differential was enlarged instead of eliminated in typical bureaucratic response to a politically sensitive problem. (A. 351-52, 354, 456-57, 601-03, 606).

I. NO LOSS CAN RESULT TO NEARBY PRODUCERS FROM THE TERMINATION OF THE NEARBY DIFFERENTIAL THAT CONTINUES TO CAUSE DISORDERLY MARKETING AND INJURY TO NON-NEARBY PRODUCERS AND CONSUMERS

On January 1, 1964, prior to consolidation of the milk orders on Oct. 1, 1964, there were 692 nearby producers and 7,371 non-nearby producers under the Greater Boston order, and only 67.9% of the nearby milk was assigned to Class I use. The percentages were higher for all zones out to the middle of the milk shed, varying from 79.1% in zones 9-15, 84.1% in zones 16-17, 70.7% in zone 18, and 90.5% in zones 19-20 of the milkshed or 200 miles from Boston. In January, 1965, after consolidation of the orders, the non-nearby producers numbered 7,696, but the nearby producers jumped to 2,620 and increased the nearby differential payments over four-fold. The

official reports of the market administrator disclose that the 7,696 non-nearby dairy farmers under the order on January 1, 1965 decreased to 6,706 on January 1, 1966, *a loss of almost one thousand distant producers in the first year following consolidation* of the Greater Boston order with the secondary market orders of Worcester, Springfield and Southeastern New England. The nearby producers under the order decreased by but 299 during the same period, and they sustained a reduction of only 223 nearby producers in 1966 as compared to a loss of 485 non-nearby producers in that year.

Moreover, the administrative records disclose that many non-nearby producers who had supplied the secondary markets for years and had made investments in reliance thereon were forced out of business by the lowering of their price when federal regulation spread the nearby differential to those markets where it had never before existed. (A. 609, 697-99, 695, 692-93). Unlike the nearby producers, the non-nearby dairy farmer has no alternative economic opportunity in most rural areas when low returns and high costs drive him from dairy farming. He is unable to sell his land at huge profits for housing subdivisions or commercial development. He usually salvages a small piece of land with his modest homestead and thenceforth contributes little or nothing to the growth and economy of his community. His children or hired help migrate to cities which are already overcrowded with individuals who are ill-equipped by training and background for urban absorption. The present extent of this mounting problem cannot be over-stated and is receiving the attention of the Congress, governmental agencies, a large number of states and many private organizations.[1] It is significant that the record below contains numerous affidavits from local and state officials in Vermont attesting

[1] See Congressional Record, 91st Cong., 1st Sess., at S2034-S2040, E1214-E1215, and bills H.R. 7336, 7575, 7617, 7789 re "tax farmers"; also at H13227, H1007, E1421 re rural areas, rural job development, and rural migration to cities.

to the loss of dairy farms in that state, and many non-nearby producers in upstate New York who market under the Connecticut order often lose $5,000 or more annually by virtue of that nearby differential. Many marginal dairy farmers could have stayed in business if the differential payments had not been exacted from their uniform minimum price, and their remaining in business would have inured to the benefit of small business communities and the financial support of local governments. A. 166-86) A growing threat to the consumer welfare and an adequate milk supply is also inherent in an inconsistent and discriminatory differential that precipitates such problems and the demise of natural dairying areas which have no other substantial economic opportunities or industries.

The respondents note that Rhode Island nearby producers supply but about one percent of the milk for the Massachusetts–Rhode Island marketing area, and that their numbers are steadily dwindling as a reliable source of the milk supply. On January 1, 1965, there were 262 nearby producers located in Rhode Island, and this number was decreased to 203 as of January 1, 1967, a drop of 59 producers in the two-year period preceding the escrowing of respondents' monies in this case. The brief *amicus curiae* states that Rhode Island's "many producers" now number but 178, a decline of 25 in the two-year period that the nearby differentials have not been paid to Rhode Island producers. The respondents respectfully submit that these figures reflect that Rhode Island producers are in no manner dependent upon non-nearby dairy farmers for economic survival.

In respect to the contention of the *amicus curiae* that Rhode Island producers obtained higher prices for their milk prior to federal regulation, the respondents note that Rhode Island producers could not market their milk under the higher prices of the state's preferential price program for local producers; that the higher prices were in part

attributable to the fact that Rhode Island would obtain much of its milk as needed from the Greater Boston market, thus forcing the respondents to bear the burden of surplus that should have been associated with the Rhode Island and Southeastern New England markets, and that Rhode Island producers would have lost their markets to non-nearby producers in the absence of federal regulation. A. 340-46.

The Secretary made the same findings in respect to the "nearby" Massachusetts producers (A. 331-39, 349), and it is clear that they can continue to enjoy the benefits of federal regulation without receipt of the nearby differential subsidies from smaller fellow dairymen in less populous and influential states.

The preliminary injunction and escrow order was entered on January 16, 1967, and the official figures from the Market Administrator's annual statistical reports discloses that there were 1,411 Massachusetts producers who marketed under the Order as of January 1, 1967. The same reports reflect that there were 1,664 Massachusetts producers under the Order on January 1, 1965, and this would indicate a loss of 253 Massachusetts producers during the prior two-year period. As of January 1, 1969, there were 1,180 Massachusetts producers under the order, a drop of only 231 producers during the two-year period of the escrow account. *The official reports thus show that fewer Massachusetts producers who marketed under the Order left dairy farming during the two-year period of escrowing than in the prior two year period of 1965-1967,* and the respondents respectfully submit that such fact evidences the lack of necessity for continued subsidization of nearby producers by the respondents.

The brief *amicus curiae* also refers to average income figures for either dairy farmers or all farmers in the Northeast United States, the exact reference not being fully

identified in the brief. The reference would include non-nearby dairy farmers in any event, and their smaller incomes would necessarily reduce the overall average figure and render it inapplicable to the larger nearby producer. Significantly, the brief acknowledges the larger size of the average nearby producer's operation when it cites the increase in the size of their herds in the last ten years. This clearly indicates that nearby producers are able to sell their herds to other nearby producers when they decide to sell their land at huge profits for housing developments or other commercial purposes.[2] This citation would also indicate that there is little overall impact on the Massachusetts dairy business when nearby producers do sell their farms and their cows. Under these circumstances, the statistical data cited by the *amicus curiae* as to attrition in the number of nearby producers or farms has little real meaning or significance.

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[2] "I, Herman L. Sparrow, have for fourteen years owned and operated a dairy farm in the town of Northboro, Worcester County, Massachusetts, which has been in my family since 1900 and on which I produced 1,118,967 pounds of milk during 1966 which was sold to a handler regulated under the Massachusetts–Rhode Island federal milk order. My income from the farm operation for this year was about $74,000 and my expenses for the year amounted to about $72,100 without allowing for any return on approximately $27,000 of new capital invested in the business. Net return for my labor and management above expenses was therefore $1,900 and allowance for five percent return on capital invested would reduce this figure to $550. Without the $.46 per hundredweight differential payment I now receive, my gross income would have been $5,147.40 less in 1966, and I would have begun to seriously consider disposing of my property for a housing development. * * *." Respondents submit that such affidavits are unrealistic, counsel proffering the same not assuming responsibility therefor even though he had notarized some of the same, and they further maintain that they should not have to subsidize such producers who could obtain a better return from a bank for their monies.

The brief *amicus curiae* also alleges that "Connecticut's total producer numbers have shrunk from a 1955 total of 3,689 to the current level of less than 1,300", and that the average monthly loss numbers between 7 and 8 producers. Of course, the citations fail to note that such loss is much below the losses suffered in other markets, and we note that some of the same selective figures are utilized in the joint brief as were set forth in the brief *amicus curiae* of the Commonwealth of Massachusetts in support of the petitions for certiorari. The Court is respectfully requested to consult the respondents' brief in opposition thereto for a full rebuttal of such misleading statistics that fail to note various relevant factors.[3] Moreover, we are unable to follow the various "numbers" employed in this and related litigation, and note that the government advised in *Cranston* that there were 1,800 nearby producers serving the Connecticut market in 1967 as contrasted to the figure of 3,000 mentioned in the *Cranston* decision.

It would require the essence of legal legerdemain to argue that the Connecticut nearby differential provision is intended to reward nearby producers with a 2-cents differential payment rather than to penalize non-nearby producers at the rate of 44-cents for each hundred pounds of milk they market in Connecticut. The nearby differential is hardly "economically legitimate" under such circumstances, and it is equally obvious that there would be no price reduction or decline in respect to nearby producers if their milk is actually worth 2-cents over the uniform minimum price as the *amicus curiae* alleges in its brief. The fact that Connecticut is defined as the

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[3] The present brief *amicus curiae* does not attempt to justify the statistical citations by reference to the official statistics of the Market Administrator's Office.

marketing area under the Connecticut Order is also not without significance since no other Order has a marketing area defined by the borders of a state. The Congress was certainly not referring to the borders of a state when it specified that *regional* production and marketing areas should be utilized in the milk orders, and it is also obvious that costs of production and other like factors do not vary appreciably for farmers located just over the Connecticut boundary.[4]

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[4] Milk and its products are exempt from the requirement of Sec. 8c(11) of the Act that limits orders to the smallest regional area, and such matters as production costs are considered in determining the *regional* marketing or production area. Moreover, the colloquy involving Sen. Copeland revolved primarily around the size of such regional area and the latter's view that his district should not be included in an arbitrary region. He was assured by Sen. Murphy that the Secretary would not do this, but he was also informed that all producers within the same region would be subject to the same terms. Sen. Murphy also cited the differentials that were authorized under the Act and which reflected the present practice of business, such as the location differential that provided for an adjustment for the place of delivery of the milk, in that the cost of transporting the milk to the primary market entered into the pricing of the milk. He mentioned the market differential which was paid for the direct delivery of the milk to the city plant or market and which provides a service or saving to the handler by the elimination of handling costs involved when milk was first delivered to a country plant. He mentioned the differential for grade or quality of the milk delivered and which compensates producers for a milk of a certain butterfat content. All of these items reflected the then present practice of business and to some extent relate to production costs generally, and Sen. Murphy assured Sen. Copeland that the Act provided for the same. Nearby producers are still compensated for such location value of their milk under the order, but handlers never paid an extra payment to "nearby" producers simply because of the location of their farms and there was no "nearby" differential until it was placed in the 1937 Boston order.

The reference of the *amicus curiae* to the alleged reliance of nearby producers on continued receipt of such illegal exactions from respondents is an obviously unsound and inequitable argument. One could argue with equal force that the increased costs of necessary supplies should be borne only by non-nearby producers because the nearby producers had not anticipated such increased costs. The nearby Rhode Island producers might argue that they need such nearby differential payments because of anticipated institution of a state income tax in Rhode Island. Even an individual who had been embezzling monies from his employer over a long period of time could argue that he should continue to receive such monies because of reliance thereon and investments made upon such basis. But it must be remembered that non-nearby producers go out of business and simply bear the loss of their vocation and investments. The fact that one's expected profit or return is decreased, however, would not entitle one group of individuals in a particular field of endeavor to claim that the unexpected lower profit or return should be covered by a forced payment from their fellow workers or investors. Nor should this reasoning apply to require an extra profit or return to certain preferred producers, particularly from out of the pockets of the smaller dairy farmers. This is neither good Government nor sound economics. It creates illegal discrimination among dairymen and leads to disorderly marketing.

Moreover, the total lack of merit in the fallacious "reliance" argument is illustrated by the testimony of nearby producers in the *Cranston* trial, and said testimony evidences that such arguments do not usually originate with dairy farmers. One nearby producer testified in that case that he had relied on such differential payments in making an investment of $107,000 and another stated that he had relied on such payments of 46-cents per hundredweight (or almost $5,000 annually) in incurring

indebtedness that required payments of about $1,000 per month. These nearby producers stated that they were receiving nearby differential payments of 46-cents per cwt. under the Connecticut milk order, but the differential in that order returns them only but about 2-cents per cwt. or an average of $12.50 per month over the uniform price in the absence of such differential. They testified that the CMPA economist had instructed them concerning the nearby differential payments, and the lack of merit in the argument concerning "reliance" on the nearby differential payments in making investments, etc., becomes painfully evident when it is realized that this same argument was even made in respect to the 2-cents nearby differential of the Connecticut order. Additionally, other "nearby" producers all across the United States are able to exist without such subsidies in making their investments. Nevertheless, the *Cranston* trial devotes page after page to such inaccurate testimony that only serves to illustrate that most nearby producers did not even know they were receiving such a differential payment. Most nearby dairymen would not be in favor of exacting such payments from their smaller fellow dairymen, and some nearby Massachusetts and Vermont producers actually signed a petition stating that they favored elimination of the differential.

The respondents respectfully submit that the Connecticut nearby differential, rather than serving as a reason for reversal, actually demonstrates that the lower court's decision was correct and that such decision should be affirmed. It graphically illustrates how such a device can be utilized in a most unjustifiable and discriminatory manner to injure producers and consumers alike. It forecasts the complete chaos and disorderly marketing[5] that would

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[5] The *in terrorem* contentions of USDA personnel referred to by *amicus curiae* are made as a matter of course in all milk cases to dissuade the courts from discharging a plain duty. Identical

occur in every market if such an illegal price preference could be obtained through political and group pressures. It predicts the nullification of the very purpose and policy of the Agricultural Marketing Agreement Act and a return to the cut-throat competition that led to a national emergency in the milk supply. It is clear that the narrow interest of Connecticut, Rhode Island, or Massachusetts producers may not predominate over the public interest or constitute a singular exception to the Act and Constitution.

Although the brief *amicus curiae* cites an affidavit of the CMPA economist, Stewart Johnson, concerning shifts to the present Order and higher retail prices to consumers as a result thereof, respondents note that the testimony of said CMPA economist has been not only prejudicial in favor of his employer but also extremely self-contradictory. Indeed, Dr. Johnson actually admitted during the 1963 hearings that he was concerned with milk moving into the Connecticut Order market (A. 560), and it is difficult to perceive how this would raise rather than lower consumer prices. The testimony of said economist during the N.Y.-N.Y. hearings of 1956 when he appeared for "nearby" producers hardly denotes any interest in the consumer:

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[5] (Cont'd)
statements were made in the *Blair* case but that Order is functioning much better without the nearby differential. Petitioners and the *amicus curiae* resort to adjectives rather than facts, and such contentions are made to counteract the fundamental fact that chaotic conditions would prevail in every market if the nearby differential is judically validated. Moreover, it is difficult to perceive how Connecticut producers can create chaotic conditions in the surplus Mass.-R.I. market by changing their marketings to the deficit Connecticut market.

A. From Testimony of Dr. Stuart Johnson, C.M.P.A. Economist, During 1956 N.Y.–N.J. Administrative Hearings, Re Reasons for Higher Price Statistics for Nearby Milk:

CROSS EXAMINATION BY MR. WINTON:

"Q. Do you know how much milk is being sold at those prices, or whether the producers regulated by OMI aren't losing markets? A. I have no comment on that. Dr. Waller covered that on need for market.

Q. You recognize there is a difference between fixing a price and marketing milk at that price, don't you? A. I recognize that difference, Mr. Winton.

Q. And you are not going to testify how successfully milk is being marketed at the prices fixed by OMI though you cite price fixed by OMI? A. I am interested in prices received by farmers.

Q. And not how many of them receive it? A. And how many receive it.

Q. Then you must be interested in whether they are able to market their milk, the thing which you said you weren't interested in. A. I think most farmers in Northern New Jersey do have a market. I haven't hear of any of them dumping their milk or feeding it to calves because they had no market whatsoever.

Q. You have read about them switching under Order 27, haven't you? A. I have general knowledge that there have been transfers from one market outlet to another.

Q. No, from OMI regulation to Order 27. You know that, don't you? There has been an increasing number going to Order 27 because they didn't have another market. A. It depends on what time period you choose, but you can find periods of recent years when shifts took place in that direction.

Q. As an expert in the milk business, don't you know, and isn't it something that would occur to you, that when differences exist between two markets, they are often the result of manipulation of health approval? . . . .

THE WITNESS: I wouldn't use the word "manipulation"because it has an inference that Health Departments were doing something wrong. But I would say that price differences have been associated with Health Department requirements in some instances.

Q. Assuming that that was the responsible policy of the officials of the State of New Jersey, would you say that the Secretary of Agriculture would be warranted in adopting price differences resulting from such policy as the basis for pricing milk under a Federal order? A. I don't know whether that was the policy and, if so, for how long, and I have no comment.

Q. Do you think that irrespective of what the health practice of regulating milk was, for purposes other than health regulations, the resulting price situation should be perpetuated by Federal order?

EXAMINER HYDE: He has indicated he is not going to talk about these health matters, Mr. Winton.

Q. You are aware, are you not, you are from Connecticut, that health practices have also been utilized in Connecticut, similarly, and that this is something which an economist should be aware of?

MR. DOLAN: I object as immaterial. . . .

EXAMINER HYDE: The witness has indicated that he is not going to talk about health matters, Mr. Winton, and you have asked him five or six times. In my opinion, that is ample to show his attitude. Pass to something else."

"Q. Did you give the testimony which I have marked off here? A. I did."

* * *

"MR. WINTON: 'Mr. Andresen: In other words, at any time a farmer can meet the sanitary requirements of Connecticut he can ship milk or cream into the area?

> "Mr. Johnson. With that proviso of meeting the sanitary requirements and obtaining approval, the answer is yes.'

By Mr. Winton:

Q. Wasn't it clear to you that there was something more to getting into a market than meeting the sanitary requirements; You also had to have an authority that was willing to approve you, even if you met the sanitary requirements?"

* * *

"MR. LENT: The witness has testified to a locational differential for the separate New Jersey order, which is higher than the locational differential in the present New York order to producers across the line in Orange County. He has said that the justification for that is an historical record of higher prices on the New Jersey side of the line.

Mr. Winton is trying to show that that justification was based on a restricted, competitive situation, caused by the Health Department of New Jersey activities. It seems to me it is directly connected with his direct testimony, and while this question is more important to the proposition of the requirement of Jersey Health Department approval for admission to the New Jersey order pool, it nevertheless has pertinence to the amount of the location differential as well. . . .

MR. WINTON: In that connection, the refusal of the witness to discuss the underlying facts which an

economist should take into effect when considering the reasons for the prices, I think should give rise to the inference that the difference is due entirely to the reasons which the witness refuses to discuss."

* * *

"Q. You refer on page 25 of Exhibit 34, to a letter of Dr. Vial pointing out the existence of premiums. In that same letter, was it not pointed out that the premiums did not exist in Orange County, New York, in anywhere near the amount shown for Sussex County? A. That is correct, Mr. Winton.

Q. And Orange County and Sussex County are situated relatively the same distance from the market, are they not? A. I think they are about the same.

Q. In your opinion, what is the difference between Orange and Sussex County due to? A. I don't know exactly, Mr. Winton, and I don't know whether I should speculate on a matter on which I do not have detailed knowledge.

Q. The next paragraph on page 25 says, "Whatever the reason, whether seasonally uniform production, a schedule of transportation differentials under Order 27, which underprices nearby milk, or a more marketable product than more distant milk, the fact is clear that historically the nearby producers who likely would be included in a North Jersey pool have received substantial premiums over Order 27 prices, which prices include the Order 27 location differential."

There you are referring to New Jersey producers, aren't you? A. Primarily so, Mr. Winton.

Q. Secondly, your conclusion in this paragraph is you don't know the reason why the New Jersey producers have gotten more money than other producers

similarly situated, because you say whatever the reason, and you don't state what the reason is, is that correct? A. Well, I state whatever the reason, and then I give three reasons that I think are pertinent in making possible the premium.

Q. The first two you have already admitted have nothing to do with location differentials as you propose them under Order 90, that is, seasonally uniform production, and under-pricing transportation differentials. A. I have said they have little to do with it, yes.

Q. Now we get, then, to what we have been getting to gradually, the more marketable product.

Do you say that North Jersey milk is more marketable than Orange County milk or other milk that is further away in the milkshed? A. Do you have a question?

Q. Yes. I say, do you say that? A. Yes, I do.

Q. And by more marketable, do you mean marketable at a higher price? A. That is what I mean.

Q. Then does that mean anything other than that historically New Jersey producers have received somewhat more than other producers? A. The two go along together, Mr. Winton.

Q. They are the same thing, aren't they? A. Well, they are not identities, but because of greater markeability the price is higher.

Q. Would one of the factors of marketability be that the Department of Health of the State of New Jersey has restricted outside milk coming into the state so that the nearby milk occupies the Class I market to a greater degree? Is that one of the factors? That is, of marketability? A. It may or may not have been, Mr. Winton. I see we are back on the health question again. . . .

Q. Did it come to your attention that surveys by the New Jersey Health Department, published in its official bulletin, showed that milk produced outside the State of New Jersey and approved for New Jersey had less bacteria than milk produced within the State of New Jersey? I show you, in that connection, Exhibit 98. A. Exhibit 98 had not come to my attention, Mr. Winton. . . .

Q. Don't you think before you discuss the greater marketability of milk produced nearby, you should have checked either in the Department of Health of the State of New Jersey or its official publications, data showing that the nearby milk was not of as high a quality as the far away milk, because for this reason stated by the Health Department, "The comparison may be explained in part because we select and license from all available supplies situated outside our borders only those that comply with our laws, but at the same time we must live with, and by means of education improve, supplies located in New Jersey". A. A more pertinent factor, it seemed to me, Mr. Winton, was that a large number of producers were approved any many more than needed, to supply the fluid market. . . ."

"Q. Did you notice this, that the state Health Department said that, as to out of state supplies, they enforce their laws strictly, but they went on to say, "Definite health hazards must be proven before we close a man's business in the state and deprive him of a means of livelihood?"

Don't you think that is also a factor which you should consider in talking about the greater marketability of nearby milk; A. I did not read the sentence that you have pointed out to me, Mr. Winton."

"Q. As an economist, and student of milk marketing do you think that regulation should put a higher tag on milk produced under less rigorous sanitary requirements than out of state milk? A. By a higher tag, Mr. Winton, what do you mean?

Q. The price tag. To price it higher because of the bacteria count or other quality? A. No, I do not think so, Mr. Winton."

Although CMPA economist Stewart Johnson refused to testify in the interest of the consumer during the aforesaid hearing, it is noted that the Report of the Federal Milk Order Study Committee (Nourse Committee) had no hesitation in condemning the methods employed in Connecticut to prefer local producers. Further, the only individual who dissented from the Report's recommendation to abolish or re-examine the nearby differential was NEMPA economist C. W. Swonger whose testimony at administrative hearings was often the essence of self-contradiction. (A. 689-91, 694-95, 696-97). The Secretary has consistently refused to accept the recommendations of experts appointed by himself, and it is evident that no basis exists for further "study" of the following discriminatory practices:

From the 1962 Report of the Federal Milk Order Study Committee (Nourse Committee) appointed by the Secretary:

"OBSTACLES TO INTER-ORDER TRANSFERS OF MILK SUPPLIES

Among the order provisions and other factors that have interfered with normal adjustment of utilization patterns and uniform producer prices through orderly transfers of milk supplies from one market order pool to another are the following: individual handler pooling,

"pooling requirements, assignment of other source milk to lower classes, compensatory payments, special location differentials to "nearby" producers, sanitary regulations and other institutional factors."

* * *

"*Sanitary regulations.* When the system of Federal milk orders was inaugurated, lists of plants and producers approved by the health authorities of various states and municipalities were useful as a basis for identifying the milk supplies to be priced and pooled under the orders. Thus in many instances municipal or State health authorities found themselves in a position to determine what milk supplies could be pooled under a given order. The situation has changed, however, and health authorities now have much less influence over the composition of Federal order pools than they had during the early years of the program.

The requirements for pooling make it necessary in most instances that the sources be approved by local or State milk inspection authorities. Many of the orders embrace the jurisdictional areas of more than one such agency thus limiting the opportunity of any one agency to control access to the pool. During recent years there apparently have been few instances in which sanitary inspection agencies have attempted to restrict entry of milk supplies to the marketing area for other than valid sanitary reasons.

The Connecticut milk order pool is a noteworthy exception to this general condition of freedom from control by milk inspection agencies. The milk marketing area defined by the Connecticut order is completely within the jurisdiction of the State Commission of Agriculture and Natural Resources who administers the dairy laws of Connecticut, including the so-called "Connecticut Milkshed Law." This law among other things authorizes the

"Commissioner to approve new sources of milk supply only when the receipts of Connecticut handlers exceed their fluid sales by less than 10 percent in November or December or by less than 25 percent in other months.

From the viewpoint of milk producers and public authorities in Connecticut this system of regulation undoubtedly has great merit. But from the viewpoint of achieving equitable relationships among producers and handlers under the Federal orders for Connecticut and adjacent areas it constitutes an arbitrary barrier. It accounts to a considerable degree for the high Class I utilization under the Connecticut order as compared with the much lower utilization percentages for the adjacent Boston and New York-New Jersey orders.

Such extra-order control of access to market order pools should be a matter of serious concern to the Department. As suggested in the preceding discussion of Marketing Areas, one promising remedy for such outside interference with a Federal order is to so define the marketing area that it will embrace the jurisdictional districts of more than one sanitary control agency. But this remedy alone may not be adequate in all cases."

* * *

"Individual handler pooling.

. . . Individual handler pooling and market-wide pooling in the orders for adjacent or competing markets are incompatible for two reasons: first, because individual handler pooling tends to cause handlers to restrict their purchases of milk and to throw a disproportionate burden of maintaining regional reserves upon neighboring market pool or orders, and second, because operating cooperatives under orders with individual handler pools have an economic incentive to move their surpluses into other markets at cut prices.

"Only by keeping his milk supply closely adjusted to his fluid sales can a handler under an order with individual-handler pooling place himself in an advantageous position from the standpoint of procurement. If he fails to maintain a high Class I utilization which permits him to pay attractive blended prices, he will find competitors picking off his more desirable producers. The high Class I utilization and high blended returns are, of course, beneficial to the producers who are fortunate enough to participate in them. But this system usually reacts unfavorably upon the producers whose milk is priced and pooled by other orders in the same region.

Practically without exception, individual handler pools have failed to absorb their proportionate shares of the reserve supplies of market milk in the regional areas where they are used. A comparison of Class I percentages for the 14 handler pool orders and the market pool orders nearest to each of them for the year 1960 reveals the following: the simple average of Class I percentages for the handler pool orders was 84.5 percent; the comparable average for 25 adjacent market pool orders was 67.3 percent.

It is clear that individual handler pooling has a strong tendency to prevent desirable utilization adjustments among Federal order markets and to maintain unwarranted disparities in the blended producer prices established by the two types of orders.

As indicated previously, individual handler pooling in markets where substantial quantities of milk are handled by cooperative associations may generate unfair competition not only in the markets to which this system applies, but also in others.[3] Since cooperatives are allowed to pay members the net proceeds of their operations, they have a strong incentive under individual handler pooling to dispose of surpluses in outlets that will yield

"more than the surplus value. This usually means sales for fluid use in outside markets at cut prices." [Footnote omitted]

* * *

"Substantial and continuing differences in utilization and in blended producer prices under orders for adjacent markets should be recognized as evidence of discrimination which inevitably leads to disruptive competition."

* * *

"*Special location differentials to "nearby" producers...* In fact, the specified rates of nearby differentials are the same under all Federal orders for New England markets (46 cents in the nearby area and 23 cents in the intermediate area) even though the percentages of pooled milk used in Class I differ widely. In 1960, the range of Class I percentages was from 58 percent in Boston to 79 percent in Connecticut . . .

Under the Boston order, nearby differentials are paid on only about 6 percent of the pooled milk and the uniform price is depressed less than 3 cents per hundredweight by these payments. Under the New York-New Jersey order, slightly less than 20 percent of the pooled milk qualifies for the nearby differentials and the uniform price is depressed about 6 cents per hundredweight.

On the other hand, under the Federal orders for Worcester, Springfield, Southeast New England and Connecticut, nearby differentials are paid on 65 percent to more than 90 percent of the pooled milk and uniform prices are depressed from about 30 cents to more than 40 cents per hundredweight. In 1960, 90 percent of the pooled milk under the Connecticut order qualified for the 46 cent differential, and 3 percent for the 23 cent differential. The total amount paid in nearby location differentials was equivalent to 43 cents per hundred pounds of

"all pooled milk and the uniform price to producers outside the differential zones was depressed to that extent. Thus, the attraction of the high blended price resulting from a high Class I utilization under the order is substantially reduced with respect to producers in the outlying areas.

In circumstances where a high percentage of milk qualifies for the nearby differentials the producers who participate derive little net gain except for the pool tightening effect of the lower blended returns in the outer zones. Thus, order provisions for nearby differentials of this magnitude can and do effectively limit access to the pools . . .

The uniform prices determined under several of the orders are significiantly depressed by payment of special differentials out of pool funds to "nearby" producers. In a few instances, a high percentage of the milk in the market order pool qualifies for such payments with the result that returns to producers in the outer zones are substantially reduced. Aside from the equities involved internally, such large special payments constitute a barrier to the entry of additional supplies from adjacent production areas and tend to prevent desirable intermarket adjustments. The Committee suggests that the justification for such differentials be reconsidered, especially in the case of areas with high fluid utilization, with particular attention to the impact of these payments upon producers who are ineligible to participate . . . "

Many of the aforesaid matters were reported to the Secretary 30 years ago in a study entitled, *Barriers To Internal Trade In Farm Products, A Special Report To The Secretary Of Agriculture By The Bureau of Agricultural Economics,* United States Department of Agriculture (USGPO, March, 1939) which enumerates many barriers to free trade between the New England states:

"Apparently the State of Connecticut has followed the practice of limiting its out-of-State inspection of farms that produce fluid milk for the Connecticut market. In 1931 permits were withheld from a small group of producers in New York State, located near the Connecticut border, who had been sending milk into Connecticut. Public protest led to the revival of these permits, but with the provision that the New York producers must pay inspection costs. Despite the concession, relatively little milk has been permitted to come in from outside the State. In part, at least, as a result of this restrictive policy, Connecticut producers have been enabled to get relatively high prices for their fluid milk. Spencer, Leland, *Practice And Theory Of Market Exclusion Within The United States,* Journal of Farm Economics, vol. XV, pp. 150-51.

This conclusion is supported by the study made by the Federal Trade Commission of the Connecticut milkshed. The commission reports that – 'There are . . . indications that Connecticut has used its milk inspection laws advantageously in keeping out milk from other States, although it does not admit this use of its powers.' *Sale and Distribution of Milk Products, Connecticut and Philadelphia Milksheds,* 74th Cong., 1st Sess., House Doc. 152 (1935) p. 90.

Recent dairy legislation passed by the State of Connecticut directs the State commission to refuse to inspect farms outside the 'natural milkshed.' Perusal of the pages of the Connecticut Milk Producers Association Bulletin strongly indicates that an important purpose of this legislation was to secure even more effective restriction of out-of-State milk. *Connecticut Milk Producers Association Bulletin,* April, May, and June, 1937.

" * * * Bills have been proposed before the last two sessions of the (Massachusetts) legislature which

"would extend inspection requirements to cream as well as fluid milk. One of the latest proposed measures provided that special inspection certificates should be issued to cream shippers which would not entitle them to ship milk as well. Such a distinction is apparently related not so much to public health as to market exclusion. At least the editor of the *New England Dairyman* seems to have regarded protection to Massachusetts producers as the chief purpose of the proposal. See, for example, the issue of January, 1938.

" * * * By an amendment to its laws in 1936, Rhode Island required reregistration of all dairy farms. In this process, 62 registrations of farms were terminated in Massachusetts and Connecticut and only one distributor was reregistered in Vermont. The number of shipments of milk from Vermont have been nearly cut in half since 1931, * * * See Fielding, J.G., *A Study of the Milk and Cream Supply of Greater Providence,* 1929-31, R.I. State Coll., Agr. Expt. Stat. Bull. 237.

* * *

"Small towns as well as large cities place definite limits on the area from which they will accept shipments of dairy products. In a study recently completed, R.G. Bressler, Jr., shows that three Massachusetts towns follow this plan. He points out that grade B milk for Haverhill must be produced within 40 miles of the town, for Walpole within 30 miles, and for North Attleboro within 8 miles. Bressler, R.G., Jr., *Laws and Regulations Governing the Production of Grade B Milk in New England* (Boston, 1938)

* * *

"Instead of refusing to inspect beyond a given number of miles, the authorities may use less obvious methods.

1. Obstacles may be raised to the licensing of new producers. Inspection may be promised but indefinitely delayed, or higher standards may be required of new producers who wish to enter the milkshed than are required of those already licensed. Thus, farmers seeking to enter the market may be discouraged by being told that certain expensive alterations in their plant or new equipment will be required before permits will be issued."

* * *

"A press release issued by the United States Deparment of Justice, dated July 7, 1938, describes how sanitary regulations may raise barriers to trade. It says in part:

> ' . . . A frequent method of erecting such a barrier was limiting the number of farms which could be inspected and certified by the health authorities in a given milkshed. In some cases municipal ordinances prevented farmers located beyond an arbitrarily selected area from obtaining licenses to ship milk to the city in question. More often, however (and this is true in the Chicago area), the area in which farms could be inspected was left to the sale and uncontrolled discretion of the health authorities. This resulted in a condition under which farmers able to supply milk of the required grade were denied a market under ordinances ostensibly directed at sanitation. This development gave local boards of health not only sanitary control over the quality of milk, but economic control over the price of milk, because they regulated the supply. It created enormous political pressure upon such boards

"Gradually their part in the milk price became openly admitted at public meetings . . . '"

"Although the general public is often unaware of these informal market limitations those in the industry usually understand the situation and often given such restrictions their open approval. The case may be cited of a statement made at a meeting sponsored by the milk control board of a New England state. A member of a milk producers' association who addressed this meeting gave enthusiastic approval of restriction through health measures. The Springfield Republican reported him as saying:

> 'The attitude of the board of health is the key to success in producing a situation in which the surplus milk problem is brought to the vanishing point. This desirable result is produced by refusal of the board of health to approve dairies outside a certain radius.' (October 16, 1935).' "

* * *

"One other type of market limitation that comes under the heading of health regulations is that having to do with pasteurization and transportation to market. * * * Rhode Island stipulates that normally all milk shipped into the State shall go directly from the farm where it is produced to the consumer or dealer within Rhode Island. The disadvantage of this law to farmers located any appreciable distance from the Rhode Island boundary is obvious. If milk is delivered in violation of this Rhode Island law the commissioner of agriculture of the state is empowered to add colored vegetable matter to this milk so that it may be easily identified. On August 10, 1937, such action was taken and red coloring matter added to 5,000 quarts of milk

from Bellows Falls, Vermont. This was widely protested and court action was begun by the interested distributors. * * * "

Little improvement resulted over the years as the following excerpt from a 1955 article discloses:

"Rhode Island requires that milk be delivered to a plant within the State in the original container in which it was placed by the producer. 'Emergency' permits are granted for milk which is needed in the State but which cannot be handled at reasonable cost under this requirement. Thus, about 30 percent of the State's milk supply is received from tank trucks from plants located principally in Vermont and New York. The permits for this milk must be renewed monthly. The possibility that permits will not be renewed deters milk dealers from dropping local producers in order to buy out-of-state milk, the price of which is not subject to the Rhode Island price regulations. Milk cans were the only approved containers until recently. Assembly by tank truck from farm bulk tanks was not permitted. This requirement was contested by one company and a restraining order issued on June 12, 1953 by the Federal District Court for Rhode Island. This Order prevented the State from acting against the Company, which continued its business in Rhode Island. On April 5, 1955, the State amended the regulation and now approveds assembly of milk from farms by tank truck."[6]

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[6] *Regulations Affecting the Movement and Merchandising of Milk*, USDA, Agricultural Marketing Service, (1955), p. 26. The brief of Zuber, *et al.*, fails to mention the above discriminatory practices which injure producer and consumer alike in maintaining that bulk tank hauling of milk did not take place until 1958 and that the lower court was in error on this point. Their brief (page 74, ft. 117) understandably cites 23 Fed. Reg. 8227 in support of their contention, such citations referring to the Rhode Island or Southeastern New England market.

The respondents submit that the nearby differential reflects a continuation of the discriminatory devices that have injured consumers as well as "other producers whose production is an essential part of the market supply." (A. 343). It represents a return to the period preceding the adoption of a Constitution which it violates in the most fundamental sense:

> "If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints." *Gibbons v. Odgen,* 9 Wheat., U.S. 1, 231, 6 L. Ed. 23.

"It is clear that repeated *in terrorem* contentions that are devoid of substance may not dissuade this Court from striking down a clear illegality that "has been carefully nurtured and maintained by the Secretary."

CONCLUSION

The judgment of the lower court should be affirmed.

Respectfully submitted,

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